Chow Kim Ying v Abdul Hamid bin Mat Yasin & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R3–12B-750 OF 2008
MOHAMAD ARIFF J
30 OCTOBER 2009

Tort — Negligence — Duty of care — Discharge of pump gun in crowded area — Security guard in shopping centre shooting at robber — Bullet hitting shopper — Whether weapon discharged in self-defence — Whether any element of proportionality in response taken by security guard — Whether any element of negligence on part of security guard — Whether duty of care established — Whether extra care, skill and vigilance required in circumstances — Whether shopper entitled to compensation for injury suffered

The plaintiff had gone shopping at Carrefour, Wangsa Maju in Kuala Lumpur where she suffered severe gunshot wounds to left leg and right foot. At the same time as the plaintiff was in the vicinity of Carrefour, a group of three men entered the Habib Jewels jewellery store in the supermarket complex. One of them stole a gold necklace and the security guard, who was armed with a pump gun, attempted to stop the suspect. The suspect then drew out a knife and pointed it towards the security guard. According to the security guard, he had run after the suspect and discharged his weapon once in self-defence. The security guard claimed that he shot in the direction of the suspect's feet, after he made sure there were no other persons in the vicinity. The bullet hit the plaintiff's leg and foot. The issue was whether there was any element of negligence on the part of the security guard and the security service company so as to entitle her to compensation for the injury suffered.

Held, allowing the appeal with costs to be taxed:

(1) The evidence of the security guard was hardly strong on the issue of self defence. On his own evidence he said he had asked the suspect to return the necklace, but the suspect looked as if he was about to use the 7 inch knife on him. He did not say anything else at that moment and discharged his pump gun in the direction of the suspect's feet (see para 13).

(2) There had to be some element of proportionality in the response taken by the security guard. The sense of proportion was also necessary in the context of the danger that could be posed to members of the public in the event of a jewellery shop, situated within the shopping complex, is robbed and shots have to be fired against the robbers. Common sense as well as common justice would require in such circumstances that

precautions be taken by the person or persons who own and guard the jewellery outlet, not ordinary members of the public. A duty of care exist on the part of these persons to ordinary members of the public who shop within the same shopping complex (see para 14).

(3) A gun is a lethal weapon calling for the exercise of extra care, skill and vigilance. Where a gun is discharged in a crowded public area such as a supermarket, that extra care, skill and vigilance will be even in greater need (see para 23).

(4) All ingredients existed so as to conclude there was liability for negligence on the part of the defendants to the plaintiff (see para 25).

[Bahasa Malaysia summary

Plaintif telah pergi membeli belah di Carrefour, Wangsa Maju Kuala Lumpur di mana dia mengalami luka tembakan yang teruk pada kaki kiri dan kanan. Pada masa yang sama semasa plaintif berada dalam kawasan Carrefour, sekumpulan tiga orang lelaki memasuki kedai barang kemas Habib Jewels di kompleks pasaraya tersebut. Salah seorang mereka mencuri rantai emas dan penjaga keselamatan, yang bersenjatakan senapang mencuba untuk menghalang suspek tersebut. Suspek tersebut kemudiannya mengeluarkan pisau dan mengacukan kepada penjaga keselamatan. Mengikut penjaga keselamatan dia berlari ke arah suspek dan menembak senapangnya sekali dalam mempertahankan diri. Penjaga keselamatan mendakwa bahawa dia menembak mengarah ke kaki suspek selepas dia memastikan tidak terdapat sesiapa pun dalam kawasan tersebut. Peluru mengenai kaki plaintif. Isu adalah sama ada terdapat unsur kecuaian oleh pihak penjaga keselamatan dan syarikat khidmat keselamatan sebagai memberikan hak kepada plaintif kepada pampasan untuk kecederaan yang dialami.

Diputuskan, membenarkan rayuan dengan kos untuk ditaksir:

(1) Keterangan penjaga keselamatan adalah lemah atas isu mempertahankan diri. Atas keterangannya sendiri dia telah meminta suspek memulangkan rantai tersebut, tetapi suspek didapati seperti dia hendak menggunakan pisau 7 inci tersebut ke atasnya. Penjaga keselamatan tidak berkata apa-apa lagi pada masa tersebut dan melepaskan tembakan senapangnya ke arah kaki suspek (lihat perenggan 13).

(2) Mesti terdapat beberapa elemen perkadaran dalam respons yang diambil oleh penjaga keselamatan. Pertimbangan perkadaran juga perlu dalam konteks bahaya yang boleh ditimbulkan kepada orang-orang awam jika kedai barang kemas, yang terletak dalam kompleks pasaraya, dirompak dan tembakan mesti dilepaskan terhadap perompak-perompak. Akal fikiran yang munasabah dan juga keadilan biasa diperlukan dalam keadaan sedemikian bahawa langkah beringat-ingat diambil oleh seseorang atau orang ramai yang memiliki dan mengawal kedai barang

kemas, bukan orang awam biasa. Kewajipan berhati-hati wujud bagi pihak orang-orang ini kepada orang awam biasa yang membeli belah dalam kompleks pasaraya yang sama (lihat perenggan 14).

(3) Senapang adalah senjata berbahaya yang memerlukan pelaksanaan berhati-hati, kemahiran dan berjaga-jaga yang lebih. Di mana tembakan dilepaskan di kawasan awam yang orang ramai seperti pasaraya, berhati-hati, kemahiran dan berjaga-jaga yang lebih akan menjadi lebih penting (lihat perenggan 23).

(4) Kesemua elemen-elemen wujud untuk memutuskan terdapat tanggungjawab kecuaian oleh pihak defendan kepada plaintif (lihat perenggan 25).]

Notes

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 963–1011.

Cases referred to

Caparo Industries Plc v Dickman [1990] 2 AC 605, HL (refd)
Chua Keok Seng v Wee Eng Yong [1954] MLJ 119 (refd)
Donoghue v Stevenson [1932] AC 562, HL (refd)
Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)
Public Prosecutor v Adnan bin Khamis [1971] 2 MLJ 231 (refd)
Stanley v Powell [1891] 1 QB 86 (refd)
Underwood v Hewson [1724] 1 stra 596 (refd)
Zaharah bte Hussin & Anor v Government of Malaysia [1978] 2 MLJ 63 (refd)

Legislation referred to

Emergency (Essential Powers) Ordinance 1969 s 5

Ooi Aik Lim (Ooi Aik Lim & Associates) for the applicant.
Harbhajan Singh (Ameenuddin bin Mohamed Ibrahim with him) (Ameen Harbhajan & Co) for the respondents.

Mohamad Ariff J:

[1] In this appeal from the decision of the learned sessions court judge, Kuala Lumpur, I had allowed the appeal with costs since I was of the opinion that the learned sessions court judge had failed to properly evaluate the evidence and the applicable law. After having considered the facts and the evidence presented in this case, as disclosed in the appeal record, I was of the view it was necessary to allow this appeal in the interest of justice to the appellant/plaintiff,

particularly in light of the evidence that she was an innocent party who was essentially affected by the circumstances of this case without any element of choice.

[2] The facts of this appeal can be stated very briefly, since the essential facts are few, and the evidence presented during the trial was similarly brief. There were two witnesses called for the plaintiff, and one witness for the defendants.

THE BRIEF FACTS

[3] On 18 November 1998, at around 3.45 in the afternoon, the plaintiff went shopping with her brother and sister-in-law at Carrefour, Wangsa Maju, Kuala Lumpur. That was the first time the plaintiff shopped at this particular Carrefour Supermarket. One would have thought this was a routine activity that afternoon, but by an unfortunate turn of events, she suffered severe gunshot wounds to left leg and right foot. As is well known, Carrefour is one of the largest supermarket chains in Malaysia, as indeed worldwide, and one does not get shot at Carrefour unless the circumstances are exceedingly extraordinary, and if one did get shot, the issue that has to be decided is whether the injury has to be led to pass without any compensation. There is, to my mind, a general principle of justice which must be emphasised here at the risk of the law being a sterile discipline of mere semantics without any considered view of the totality of human interests involved beyond these mere words and expended case authorities. As for the case authority cited by the respondents before me, which is the old case of *Stanley v Powell* [1891] 1 QB 86, suffice to note at the outset how incongruous that case authority can be when applied to the facts of the particular case. *Stanley v Powell*, decided as it was in 1890, was a case elaborating on principles of tort before the leading case of *Donoghue v Stevenson* [1932] AC 562, which was decided in 1932. I will return to *Stanley v Powell* and accepted principles of the principles of negligence shortly.

[4] At the same time as the plaintiff was in the vicinity of Carrefour, a group of three men entered a jewellery store in the supermarket complex, namely Habib Jewels. One of them, described as a Malay man, pretended to be interested in purchasing a gold necklace and tried the necklace on its neck. This suspect suddenly left Habib Jewels with the gold necklace. The security guard, who was armed with a pump gun, attempted to stop the suspect, but according to the evidence, the suspect then drew out a knife and pointed it towards the security guard. According to the evidence given by the security guard ('DW1'), he had run after the suspect, and the suspect was about 15ft away from him when the suspect pointed a knife towards him. According to DW1, he then discharged his weapon once in self-defence. DW1 said he shot in the direction

of the suspect's feet, after he made sure there were no other persons in the vicinity. DW1 also said he was sure the plaintiff was not there when he fired the shot.

[5] The shot did not hit the suspect's feet, however it hit his hand and as it turned out, the suspect was arrested later when he went for medical treatment at the hospital.

[6] The very same bullet hit the plaintiff's leg and foot. It apparently also injured another member of the public at the same time.

[7] According to the plaintiff, she was not aware what the distance was between where she stood and Habib Jewels, since that was the first time she was shopping at this particular Carrefour outlet. She said at the time of the incident there were, to quote her, 'ramai orang'. She was thereafter hospitalised at a HUKM and another hospital for several days. She was discharged from hospital on 25 November 1998. She was readmitted on 8 December 1998 for 'management of infected wound right foot', and discharged on 21 December 1998. She was further readmitted on 29 April 1999 for bone grafting on the 'fifth metatarsal right foot' then discharged on 5 May 1999. There was a last follow-up medical check-up 2 November 1999, for which she was certified as fully recovered. From the medical report, this was the extent of her injuries:

(1) Gunshot wound right foot and left leg.

(2) Open fracture right fourth and fifth metacarpal bone.

[8] It is therefore apparent that her injuries could not be described as slight.

[9] The following appears from the specialist medical report dated 3 August 2005 of Dr Chin Chee Howe tendered in evidence:

> Miss Chow Kim Ying is a 40-year-old woman who sustained a gunshot wound over her right foot in a shooting incident that happened nearly 7 years ago.
>
> The laceration wounds of the left leg has healed with scarring but no functional disability.
>
> The gunshot wound has left her with a stiff and painful right foot. There is a flexion deformity of the fifth toe and widening of the third web space. The weight bearing structures of her right foot have been altered resulting in callosities over the first and fourth toes.
>
> She cannot stand and walk for long periods. She cannot run as she used to and cannot stand on tiptoes.
>
> The sensory nerves over the bottom of the foot were damaged with numbness over the fifth metatarsal.

She cannot wear fashionable shoes such as stilettos and other narrow tipped shoes, as is necessary in her singing career.

Her singing career would be affected as she will not be able to wear appropriate shoes or to dance while performing.

She will be expected to have pain over the right foot permanently after strenuous activities.

[10] At the time of the incident, she was working in Singapore as a singer. The gunshot wounds resulted in her being unemployed for one year, although it was in evidence she had a medical certificate for only a period of seven months. Nevertheless, here was a member of the public going about her own routine business in a public place who was suddenly wounded in a serious way. The issue is whether there was any element of negligence on the part of the security guard and the security service company so as to entitle her to compensation for the injury suffered.

[11] In such an unusual combination of circumstances as presented in this appeal, I did not believe it could truly be concluded on the evidence that because the security guard allegedly discharged his firearm in self-defence towards the suspect who was 15ft away, he did not owe any duty to the plaintiff.

[12] It is necessary to appreciate the exact evidence of the security guard (DW1), who testified as follows:

Jam lebih kurang 3.45 petang seorang awam masuk ke dalam kedai emas ambil barang dan keluar kedai dan saya telah kejar dan minta barang kemas itu, tetapi beliau telah mengeluarkan pisau untuk menakutkan saya. Saya lihat tiada orang lain, maka saya lepaskan tembakan ke arah kaki suspek. Tetapi telah kena tangan kanan beliau. Jarak saya dengan suspek ketika beliau keluarkan pisau ialah 15 kaki. Memang tidak ada orang lain di belakang suspek. Suspek hanya ditangkap pada jam 6 lebih, di hospital dan telah dimaklumkan oleh pegawai saya. Ketika itu saya tidak tahu tembakan saya terkena tangan suspek. Selepas ditembak suspek terus lari. Selepas kejadian saya nampak kesan tembakan di dinding. Saya hanya lepaskan satu das tembakan. Saya tidak nampak Plaintif ketika kejadian. (Evidence given during examination-in-chief)

Sekeliling kedai tempat saya bertugas adalah lengang. Panjang pisau suspek adalah 7 inci. Saya minta barang itu dari suspek tetapi suspek nampak macam hendak tikam saya. Saya tidak cakap apa-apa lalu terus tembak. (Cross-examination)

[13] The evidence of the security guard was hardly strong on the issue of self defence; on his own evidence he said he had asked the suspect to return the necklace, but the suspect looked as if he was about to use the 7 inch knife on him. He did not say anything else at that moment and discharged his pump gun in the direction of the suspect's feet. The evidence disclosed bullet marks

on the wall. DW1 missed the suspect feet and apparently only injured his left hand, such that the suspect had time to flee from the scene and was only caught later that day when he went to the hospital for treatment. Since there were bullet marks on the wall, one can only surmise the bullet must have ricocheted off it and thereafter injured the plaintiff and the second member of the public.

[14] I was of the view, when reviewing the totality of the evidence as disclosed in the appeal record, there had to be some element of proportionality in the response taken by the security guard. The sense of proportion is also necessary in the context of the danger that can be posed to members of the public in the event of a jewellery shop, situated within the shopping complex, is robbed and shots have to be fired against the robbers. Common sense as well as common justice would require in such circumstances that precautions be taken by the person or persons who own and guard the jewellery outlet, not ordinary members of the public. In terms of the technical legal requirements relating to the tort of negligence, I would think in such circumstances a duty of care should exist on the part of these persons to ordinary members of the public who shop within the same shopping complex. Surely these ordinary members of the public must be persons within the reasonable contemplation of the former. A jewellery shop in an open space in the shopping complex can court danger, and it cannot be a good answer to say should anyone, such as the plaintiff, be injured if shots are fired to prevent a robbery, the injury must stand without remedy because it will be an 'inevitable accident'.

THE ISSUE OF INEVITABLE ACCIDENT

[15] Indeed, 'inevitable accident' was raised in defence by the defendants in this case, although not pleaded, and interestingly, what was pleaded was an argument akin to contributory negligence! The list of particulars under 'Butir-Butir Kecuaian Plaintif' in the statement of defence made for interesting reading, although one can be forgiven for concluding that there must be some element of black comedy involved in this style of pleading. How could, for instance, the plaintiff as an ordinary shopper within the shopping complex be expected to keep a proper lookout for her personal safety, or to exert full concentration, or to studiously observe and heed the prevailing circumstances at that time in that public place? The 'icing on the cake', so to say, must be accorded to the following particulars which fall under para (d), namely 'gagal berhenti, mengubah haluan atau dengan cara yang lain untuk mengelakkan kejadian tersebut …' I know of no authority here or in any other jurisdiction, which imposes an obligation to dodge a speeding bullet!

[16] The absurdity of the argument then centres on *Stanley v Powell*.

STANLEY V POWELL

[17] I have already noted the vintage of this case. The reference to this old

authority was quaint but quite irrelevant, since the principles adumbrated therein had more to do with the older tort of trespass to the person rather than the more modern form of the tort of negligence. The defendant, according to the report, was a member of a 'shooting party' who were out shooting pheasants. The plaintiff was employed by one of those in the shooting party, and it seems he was 'engaged in carrying cartridges and game for the party'. The defendant fired at a pheasant. One of the pellets from his gun glanced off 'the bough of a tree' and accidentally wounded the plaintiff. The court found the defendant not liable since he was not negligent in firing as he did. In arriving at this conclusion, the case contains an extended discussion on the differences between the tort of trespass to the person and the older form of negligence. For example, the even older case of *Underwood v Hewson* (1724) 1 stra 596 was cited and the full report of the case, described as 'very short', was quoted, reading as follows:

> The defendant was uncorking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass — strange pro defendante.

[18] As indicated earlier, I felt the reliance on *Stanley v Powell* was not particularly apt.

MALAYSIAN AND SINGAPORE 'SHOOTING' CASES

[19] There are Singapore and local cases more to the point, and they include *Chua Keok Seng v Wee Eng Yong* [1954] MLJ 119, *Public Prosecutor v Adnan bin Khamis* [1971] 2 MLJ 231 and *Zaharah bte Hussin & Anor v Government of Malaysia* [1978] 2 MLJ 63. Unfortunately, none of these cases were cited in argument. *Chua Keok Seng*, a Singapore case, referred to *Stanley v Powell*, but applied it more realistically by holding the plaintiff not contributorily negligent. In an action for damages for negligence, the plaintiff was shot by the defendant who was one of a party of three men shooting flying foxes. The plaintiff had been asked to accompany the party because he knew of a suitable place. The plaintiff was shot at a distance of 15 to 20ft and suffered serious injuries. At the moment when the shot was fired no flying foxes were overhead and none were within shooting range. It was submitted by the defendant that the plaintiff was guilty of contributory negligence on the ground, inter alia, that he was a voluntary member of the shooting party.

[20] The court did not so find merely by the fact of his voluntarily joining the shooting party.

[21] In *Public Prosecutor v Adnan bin Khamis* [1971] 2 MLJ 231, no doubt a criminal law case, contains a useful insight into the question that should be

asked by the court in a shooting case, which on the facts of this case concerns the fatal shooting of a person who was mistakenly taken for a *kijang* by the accused. Syed Agil Barakbah J (as His Lordship then was) said:

> As stated earlier, the president concluded there was no other evidence adduced by the prosecution except that the respondent shot the deceased who died as a result. However, at a later stage, he appeared to arrive at the conclusion that if there was negligence on the part of the respondent, such negligence did not amount to a high degree as required in in *Cheow Keok*'s case. He did not consider whether there was negligence as decided in *Mill*'s case. He gave four factors which he said acted in favour of the respondent. In coming to this conclusion he erred in not having considered the surrounding facts and circumstances adequately. When the respondent, PW5 and the deceased separated in the jungle after they had failed to locate the *kijang* which had been shot earlier, the only reasonable inference that arose was the respondent must have seen or known that PW5 and the deceased were no longer with him. PW5 from his evidence did not appear to be sure whether the deceased was following him all along to the place where he finally came to take position on a stone when he heard the shot. There was also no direct evidence that the respondent saw the *kijang* or, for that matter, something resembling it, moving in the jungle. However, in my view, considering the evidence relating to the sarong, worn by the deceased at the material time, which resembled the colour of the *kijang*, and the other relevant factors, the only reasonable and irresistible inference was that the respondent must have seen something moving in the jungle. He should therefore have made doubly sure that what he saw was actually the *kijang* before he fired at it. *He was in charge of a loaded gun, a lethal weapon, the use of which required care and skill. In the circumstances it was the duty of the respondent to take sufficient precautions before shooting to ensure that both PW5 and the deceased were out of danger. In my opinion, his action in firing the shot that killed the deceased was a negligent act which endangered human life or the safety of others and his act was the immediate cause of the deceased's death.* I am therefore of the view that the prosecution has proved a *prima facie* case which if unrebutted would warrant the conviction of the respondent. (Emphasis added.)

[22] In *Zaharah bte Hussin & Anor v Government of Malaysia* [1978] 2 MLJ 63, the facts were quite unfortunate; there was a fatal shooting of two persons in a security area by the security forces in negligent circumstances, but the government was held not liable because it was protected by a statutory provision, namely s 5 of the Emergency (Essential Powers) Ordinance 1969 which provided:

> No suit, prosecution or other legal proceedings shall lie in any court against any public officer either personally or in his official capacity for or on account of or in respect of any act ordered or done by him during the emergency period for the purpose of maintaining order or public security or of carrying into effect any regulation, order, rule, by-law, direction or notice made or issued under this Ordinance, and no suit, prosecution or other legal proceeding shall lie in any court against any other person for or on account of or in respect of any act done or

purporting to have been done by him under any regulation, order, rule, by-law, direction, notice or instruction of any public officer given for any such purpose as aforesaid.

Abdul Razak J held:

This is an action for negligence against the Government of Malaysia for the act of their servants arising from a fatal accident at Kg Legeh in Tanah Merah District in which the deceased were shot by the security forces. The event was on 11 March 1973 at about 2am. The defendant admits the shooting but denies negligence. They said they took precautions before they fired; they also said the deceased had no right to be at the place where they were found because it was a gazetted controlled area under the ISA. They also pleaded that they were justified in law to act in the way they did, driven by necessity and done in good faith during the period of the emergency. The action was therefore bad in law.

No evidence was adduced by the plaintiffs on the incident except that they said on that fatal night one of the deceased Megat Ariffin went to see the other deceased Raja Ibrahim to accompany him to look for a *bidan* because Megat Ariffin's wife was about to give birth. Megat Ariffin carried a shotgun and Raja Ibrahim a torch. They went out into the night and later they were found shot. For the defence, evidence was given to the effect that the army had been directed to go into the area of the scene of the incident because they received information that the CT were seen. Fifteen of the army men went and the purpose of their operation so the defence alleged was to lay an ambush. They took along a special branch man. On their way, they saw a light which they found to be a torch and a human figure carrying arm. The figure was flashing the torch up and down. They challenged the person 'Siapa Itu' three times and when there was no answer one of them fired at him. Later they found two persons were shot.

I am of the view that in the circumstances in which the shooting took place, the person who shot did not exercise such reasonable care as one would expect from a member of the armed forces. It was evident that the purpose of the army was not to lay an ambush but merely to investigate whether the CT were around. It was so stated in the defence. It must have been so, otherwise the purpose of the army bringing a special branch man with them was unexplainable. One would expect that they would have cautioned themselves that they were to ascertain the identity of the persons first before they acted to shoot. *The area in which the CT were reported seen was a rubber land development scheme. It was a populated area. They would have to remind themselves that kampong people being what they were would go out of their homes after dark. The circumstances called for the exercise of extra care and vigilance.* (Emphasis added.)

[23] As the two local cases indicate, a gun is a lethal weapon calling for the exercise of extra care, skill and vigilance. Where a gun is discharged in a crowded public area such as a supermarket, that extra care, skill and vigilance will be even in greater need. Having considered the totality of the facts and evidence in the appeal record, I concluded there had been insufficient attention and emphasis to this aspect of evidence and the supporting law on negligence,

and to that extent that had been a miscarriage of justice which required correction. There has to be, on a more general level of juristic consideration, an appreciation that the protection of human safety should be properly and proportionately balanced against the need to protect property and commerce. Property may be recovered intact, but this cannot be said to be the same for a serious injury to the person. As far as the current law of negligence is concerned, which was something not adequately addressed by counsel and the court, suffice it is to quote the statement of the principles in the leading case of *Caparo Industries Plc v Dickman* [1990] 2 AC 605 as applied in the Federal Court case of *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1, where Steve Shim CJ (Sabah and Sarawak) held:

> Under English law, the general duty of care test enunciated in *Caparo Industries Pic v Dickman* … is applicable to all negligence claims, including claims for pure economic loss. Pursuant to this test, three questions have to be addressed, namely, whether the damage suffered by the plaintiff is reasonably foreseeable; whether there is a relationship of proximity between the plaintiff and defendant; and whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care.

[24] Lord Bridge in *Caparo* analysed the development of the law of negligence comprehensively and held:

> The most comprehensive attempt to articulate a single general principle is reached in the well known passage from the speech of Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728 at pp 751–752:
>
> Through the trilogy of cases in this *House-Donoghue v Stevenson* [1932] AC 562, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, and *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages.
>
> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht case* [1970] AC 1004 per Lord Reid at p 1027.
>
> But since the *Anns* case a series of decisions of the Privy Council and of Your Lordships' House, notably in judgments and speeches delivered by Lord Keith of Kinkel, have emphasised the inability of any single general principle to provide a

practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope: see *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, 239f-241c; *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175, 190e-194f; *Rowling v Takaro Properties Ltd* [1988] AC 473, 501d-g; *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 60b-d. *What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.* (Emphasis added.)

[25] Transposed to the facts of this appeal, I was satisfied all three ingredients existed so as to conclude there was liability for negligence on the part of the defendants to the plaintiff. I must especially stress the third element of 'fair, just and reasonable' that a breach of duty should be imputed.

CONCLUSION

[26] For the reasons elaborated above, I allowed the appeal with costs to be taxed, unless agreed, to be paid by the defendants to the plaintiff. As far as the damages to be awarded was concerned, I felt a just award would be in the region of the overall damages indicated in the judgment of the learned sessions court judge. It would have been grossly inadequate to accept the quantum for general damages merely (RM9,000). Even in the case of *Chua Keok Seng v Wee Eng Yong*, which was decided in 1954, the court awarded $5,173.50 by way of special damages and $9,800 for general damages, making a total of $14,973.50. Although this was a Singapore case, it nevertheless provided a good indication of the reasonable quantum of compensation that should be awarded in a shooting case. I therefore ordered that judgment be entered for the full amount of damages as stated in the judgment of the learned sessions court judge, ie (a) general damages of RM8,000 (for open fracture of right fourth and fifth metarcapal bone) and RM1,000 for scarring; and special damages for loss of earnings at S$1,484 x seven months, and hospitalisation expenses of RM1,592.40, and interest thereon at the rate of 8% from date of service of the summons until date of full settlement.

Appeal allowed with costs to be taxed.

Reported by Kanesh Sundrum